UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 85

Docket No. AT-1221-09-0543-W-2

Kim Anne Farrington,

Appellant,

v.

Department of Transportation,

Agency.

July 16, 2012

Stephanie L. Ayers, Esquire, and Thad M. Guyer, Esquire, Medford, Oregon, for the appellant.

Russell B. Christensen, Philadelphia, Pennsylvania, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the September 1, 2010 initial decision that dismissed her appeal for lack of jurisdiction. For the reasons set forth below, we REVERSE the initial decision and REMAND this appeal for further adjudication.

BACKGROUND

¶2 The appellant, a former Aviation Safety Inspector (Cabin Safety), filed an individual right of action (IRA) appeal. She alleged that the agency removed her and took or failed to take other alleged personnel actions in reprisal for making

protected disclosures to Division Manager Frederick Walker and to National Transportation Safety Board (NTSB) Inspector Mark George concerning alleged inadequate funding for surveillance of AirTran airline's flight attendant training programs and deficiencies in AirTran's flight attendant trainings. MSPB Docket No. AT-1221-09-0543-W-1, Initial Appeal File (IAF-1), Tab 1.

¶3 After affording the parties the opportunity to file evidence and argument, the administrative judge determined that there were no factual disputes concerning the jurisdictional issue and dismissed the appeal for lack of jurisdiction without holding the hearing requested by the appellant.[*] *See* MSPB Docket No. AT-1221-09-0543-W-2, Initial Appeal File (IAF-2), Tab 3, Initial Decision (ID). She found in pertinent part that: (1) the appellant exhausted her Office of Special Counsel (OSC) remedies; (2) the appellant's disclosures to the NTSB and to Walker, her fourth-line supervisor and a person with subject-matter expertise, were made during the course of her normal job duties through the normal channels, and therefore did not constitute nonfrivolous allegations of a protected disclosure; and (3) the appellant's disagreement with agency policy decisions concerning funding do not constitute whistleblowing. ID at 4-15.

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[*] We note that the administrative judge did not provide the appellant with notice of the IRA jurisdictional requirements. *See* IAF-1, Tab 2. Further, she did not set forth the IRA jurisdictional standard in the initial decision by stating that the appellant must make a nonfrivolous allegation that her disclosures were a contributing factor in the agency's decision to take or failure to take personnel actions against her. IAF-2, Tab 3. The agency's submissions, however, which cited the standard set forth in *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001), cured the lack of notice. *See* IAF-1, Tab 6 at 5-6, 8 n.3 Tab 19, Mot. At 16, 27; *Boughton v. Department of Agriculture*, 94 M.S.P.R. 347, ¶ 5 (2003) (stating that an administrative judge's failure to properly inform the appellant of the Board's jurisdictional requirements may not be prejudicial where the appellant is put on notice, by the agency's motion to dismiss, of what he has to allege in order to establish jurisdiction). Further, the record shows that the appellant, who was represented by counsel, understood the jurisdictional standard. Therefore, the administrative judge's error did not prejudice the appellant's substantive rights. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

¶4 The appellant has filed a petition for review of this decision, alleging that the administrative judge erred in her application of *Huffman v. Office of Personnel Management*, 263 F.3d 1341 (Fed. Cir. 2001). Petition for Review (PFR) File, Tab 1.

ANALYSIS

¶5 The Whistleblower Protection Act (WPA) makes it a prohibited personnel practice to take or fail to take a personnel action because of "any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences--(i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." *See* 5 U.S.C. § 2302(b)(8)(A). In *Huffman*, the court, while noting that the definition of "any disclosure" under the WPA is broad, held that an employee must communicate information either outside the scope of his normal duties or outside of normal channels to qualify as a protected disclosure. *Huffman*, 263 F.3d at 1352-54. In particular, the court outlined three categories into which an employee's communications may fall: (1) Disclosures made as part of normal duties through normal channels; (2) disclosures made as part of normal duties outside of normal channels, and (3) disclosures made outside of normal or assigned duties. *Id.*; *see also Fields v. Department of Justice*, 452 F.3d 1297, 1305 (Fed. Cir. 2006). A communication can qualify as a protected disclosure under the Whistleblower Protection Act only if it falls within the latter two categories. *Kahn v. Department of Justice*, 528 F.3d 1336, 341 (Fed. Cir. 2008); *Fields*, 452 F.3d at 1305.

The appellant has made a nonfrivolous allegation that her disclosures to Walker were made outside of normal channels.

¶6 With regard to the second category, the court stated that this category may include a situation in which an employee with assigned investigatory

responsibilities reports wrongdoing outside of normal channels. *Huffman*, 263 F.3d at 1354. For example, the court found that a law enforcement officer who is responsible for investigating crimes by government employees who, feeling that the normal chain of command is unresponsive, may make a protected disclosure by reporting wrongdoing outside of normal channels. *Id.* The court has not explicitly defined the term "normal channels." However, consistent with the court's use of the term in *Huffman* and subsequent decisions, we believe that the term "normal channels" should be given its commonly understood meaning, i.e., the employee conveyed duty-related information to a recipient, who in the course of his or her duties, customarily receives the same type of information from the employee and from other employees at the same or similar level in the organization as the employee. Some of the factors relevant to this determination are: whether the communication complies with the formal and informal customs and practices in the employee's workplace for conveying such information up the chain of command; whether the organization enforces a strict hierarchical chain of command requiring that communications must go through lower level supervisors before being elevated to higher management; and whether the information was conveyed to the recipient in the organization's commonly accepted manner or method for presenting such information for management consideration.

¶7 On review, the appellant contends that the administrative judge improperly expanded *Huffman* to hold that if the officials receiving the disclosures have sufficient "subject-matter expertise" to understand the disclosures, then the disclosures are made within normal channels of reporting and that she "convolute[d] the *Huffman* 'normal duties through normal reporting channels' exclusion into a rule that no disclosure is protected anywhere up the chain of command . . . ." *See* PFR File, Tab 1 at 6, 20-21; ID at 14. We agree. Nothing in *Huffman* or any other published decision issued by the Board or the court expressly or implicitly supports the interpretation that subject matter expertise of

the official receiving a disclosure is determinative of whether the disclosure was made within normal channels. *See Huffman*, 263 F.3d at 1352-54. Therefore, we find that the administrative judge erred in finding that the appellant's disclosures to Walker were within normal channels because he had sufficient expertise to understand them.

¶8 Furthermore, we find that the appellant has made a nonfrivolous allegation that her disclosures to Walker were made outside of normal channels of communication in her organization. It is undisputed that Walker was the appellant's fourth or fifth level supervisor, and that his office and the appellant's office were located in different states. Below, the appellant alleged that she requested to meet with Walker only after her supervisor had been unresponsive to her pleas that flight attendants at Air Tran could not get travelers safely out of the emergency exit of a particular model of aircraft. IAF-2, Tab 1, Exh. 1. Further, in the appellant's deposition transcript, which was submitted to the administrative judge, she testified that she normally reported safety matters only to her first level supervisor, that she had always worked only at the local level, that she was not authorized to report matters directly to Walker, and that she had never previously taken a work-related matter to him, nor even spoken with him, prior to making her first disclosure to him in May 2003. IAF-1, Appellant's Deposition at pp. 69, 180-81, 276. Although the agency provided evidence below that Walker played a role in resolving internal staff disputes on safety related issues, we find that the administrative judge erred in finding that the appellant's disclosures to Walker were not protected because a material dispute of fact exists regarding whether the appellant's communications with Walker followed the typical customs and practices in the workplace for conveying regulatory and safety issues to higher level management.

The appellant failed to make a nonfrivolous allegation that her disclosures to the NTSB were not within her normal duties.

¶9 The appellant also argues on review that the administrative judge erroneously interpreted "normal duties" to include duties performed on a sporadic basis. The appellant contends that "normal duties" are duties performed on a day-to-day basis -- not those duties performed sporadically or on a one-time occasion. *See* PFR File, Tab 1 at 6, 9, 19. We disagree. The Board and the court have consistently relied upon position descriptions to determine whether disclosures were made as part of an employee's normal duties. *See Kahn v. Department of Justice*, 618 F.3d 1306, 1313 (Fed. Cir. 2010); *Sutton v. Department of Justice*, 94 M.S.P.R. 4, ¶ 11 n.6 (2003), *aff'd*, 97 F. App'x 322 (2004); *Comito v. Department of the Army*, 90 M.S.P.R. 58, ¶¶ 10-11 (2001), *review dismissed*, 33 F. App'x 506 (Fed. Cir. 2002). In making this determination, the frequency with which an employee is called upon to perform a stated duty has not been identified as a relevant consideration. Here, we discern no error in the administrative judge's finding that the appellant's disclosures to the NTSB fall squarely within the her normal job duties; the appellant's position description states that aviation safety inspectors participate in cabin-safety-related investigations and accident investigations, and therefore, clearly contemplates her reporting investigative findings to the NTSB. *See* ID at 13; IAF 1, Tab 8, subtab C at 7, Tab 11 at 1-2, Tab 19, subtabs B, D-F. Thus, the appellant's disclosures to the NTSB were made within her normal job duties within the normal channels of reporting, and therefore are not protected.

ORDER

¶10 Because the appellant has made a nonfrivolous allegation that her communications with Walker were outside of normal channels for reporting safety issues/disputes, the initial decision is reversed and this appeal is remanded to the Atlanta Regional Office for hearing and adjudication on the merits of the appeal. Prior to holding a hearing, the administrative judge shall afford the parties a reasonable opportunity to submit amended prehearing submissions and shall conduct a prehearing conference. Consistent with this Opinion and Order, the administrative judge shall hold a hearing, which allows both parties to meet their respective burdens under the WPA. The administrative judge shall then issue a new initial decision that makes findings as to whether the appellant is entitled to corrective action under the WPA.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.